

CALIFORNIA FISH AND GAME COMMISSION  
STATEMENT OF PROPOSED EMERGENCY REGULATORY ACTION

Emergency Action to Repeal Subsection (e) of Section 195, Title 14, CCR Re:  
Cooperation with State and Federal Fishery Observers and Adopt Section 105.5, Title  
14, CCR Re: Cooperation with State and Federal Fishery Observers

**I. Statement of Facts Constituting the Need for Emergency Regulatory Action**

Emergency regulations are needed to ensure that trained State and federal fisheries observers are provided access to commercial fishing vessels operating off California to collect essential fishery information on the level of bycatch (incidental catch) of overfished stocks of shelf rockfishes and nearshore rockfishes. This information is vital to determining and tracking acceptable harvest rates and identifying catch levels that will provide for rebuilding of overfished stocks and sustain nearshore fish stocks. A recent federal interpretation that federal groundfish observer rules do not apply to State-managed fisheries, combined with resistance on the part of some fishermen to accommodate fishery observers aboard their vessels, immediately threatens the ability of the State and federal fisheries managers to collect these data as required. Consequently, the National Marine Fisheries Service requested in a letter dated August 14, 2002, that this issue be placed on the Commission's late August agenda to take action to require commercial fishing vessels permitted by the State to carry federal observers when fishing for federally managed species in State or federal waters.

Lingcod and at least six species of rockfish (bocaccio, cowcod, canary, yelloweye, darkblotched, and widow rockfishes) are overfished off California. Also, concerns exist for nearshore rockfish and associated species that are being subjected to increased fishing by commercial and sport fishing participants that have moved into shallower nearshore waters because of increasing restrictions on groundfish fisheries in deeper waters offshore. Some fishing vessels that are fishing for State-managed species or federal species for which a federal permit is not required are refusing to participate in the ongoing federal observer program that collects this vital information. To deal with this problem so that blocks of vital fishery data are not lost, and the integrity of the dependent fisheries assessments are not compromised, emergency regulatory action is needed to require that commercial fishing vessels permitted by the Commission to operate in waters off California, and commercial passenger fishing vessels (CPFVs) required to be licensed pursuant to statute, carry federal or State fishery observers during the balance of the 2002 fishing season. These emergency regulations would be followed by a conventional rulemaking to make them permanent and effective during 2003.

As background, approximately 80 species of groundfish (bottom fish), generally associated with sea-floor habitats, are managed under the federal Pacific Coast Groundfish Fishery Management Plan (Groundfish Plan). The Groundfish Plan was developed by the Pacific Fishery Management Council (Council), and is implemented through regulations adopted by the National Marine Fisheries Service (NMFS), as authorized pursuant to the Magnuson-Stevens Sustainable Fisheries Act (Magnuson-Stevens Act). Under the Sustainable Fisheries Act, when fish stocks have been declared overfished (have declined to less than 20 percent of their unfished biomass) they become subject to Council approved rebuilding plans that are designed to restore them to at least 40 percent of their unfished biomass within a specified time period.

In June 2002, the Council closed fisheries for rockfish and lingcod (and California scorpionfish and ocean whitefish that associate with rockfish and lingcod) in waters 20 fathoms (120 feet) or deeper south of 40 degrees, 10 minutes North Latitude (near Cape Mendocino, Humboldt County) to protect bocaccio rockfish. During September 2002 the Council will be setting catch levels for 2003 groundfish fisheries, including those for overfished rockfish and lingcod, based on the fishery data collected during 2001 and 2002. Bycatch information is critical to understanding what quantity of the overfished stocks are being taken incidental to fisheries for other species. Similarly, during September 2003, the Council will be setting catch levels for 2004 based on information collected from the fishery underway during 2002 and 2003, including bycatch of bocaccio and other overfished stocks taken during September through December of this year.

The National Marine Fisheries Service has established an at-sea Comprehensive Observer Program to place trained staff aboard commercial fishing vessels to determine the identity and amount of bycatch in the fisheries. Regulations governing groundfish observers for the north Pacific groundfish fishery include provisions that are incorporated in the emergency regulations to ensure that observers are able to complete their data collection duties under reasonable and safe conditions free from harassment and interference (Section 679.7, Title 50, Code of Federal Regulations). As a part of the current program, each year boats that are to have observers aboard are randomly selected to ensure a random sample of boat catches are observed that can be used to reasonably estimate the level of take of overfished stocks in the fisheries. Some fishermen selected for the observer program to start in September of 2002 that fish for State-managed species off California have indicated an unwillingness to participate in the program and legal council for the NMFS and Council indicate that, while they can require vessels with federal limited entry

permits to carry observers, they cannot require the same for vessels fishing for State managed species or federal species for which a federal permit is not required. Therefore, this emergency action is to provide for observer coverage of vessels permitted or licensed under Commission regulations during the balance of 2002. Again, this regulatory action will be followed up with a conventional rulemaking that will make the regulatory requirements for at-sea observers effective in the long term.

Information on type and amount of bycatch collected from the observer program involving State-managed species this year will be critical to assess groundfish stocks and setting harvest levels for 2004. Therefore, if this data series is interrupted during September through December this year, it could have serious consequences on stock assessment and rebuilding efforts in coming years.

The Commission adopted similar requirements for commercial passenger fishing vessels (CPFVs) during its consideration and adoption of interim nearshore fishery regulations in December of 2000 due to the reaction (reluctance) of some CPFV operators to the groundfish restrictions that were being placed on this fishery at that time to protect and rebuild rockfish and lingcod stocks. The increasing restrictions on sport and commercial groundfish fisheries has made collection of data more difficult, but are imperative to meet the mandates of State and federal fisheries policies and directives [Magnuson-Steven's Act and California's Marine Life Management Act (Chap. 1052, Stats 1998)].

Part of the proposed action is to repeal a current section which only applies to owners and operators of CPFV vessels and barges subject to Section 195 of Title 14, CCR and to apply the provision for cooperation with State and Federal Fishery observers to all vessel owners and operators that are permitted or licensed under Commission regulations, or are licensed under statutes that give the Commission regulatory authority. The proposed new regulation provides a procedure for the Department to request revocation of permits or licenses when it determines a vessel owner or operator is being uncooperative. It also exempts vessels from having to provide food or a subsistence allowance to fishery observers but does require the vessel to meet certain sampling and information needs of the fishery observers.

## **II. Alternatives**

The Commission has determined that no alternative considered would be more effective in carrying out the purpose of which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

### **III. Economic Impact of Proposed Regulatory Action:**

The Commission has assessed the potential for significant adverse economic impact that might result from the proposed regulatory action and has made the following determinations relative to the required statutory categories:

(a) Significant Adverse Economic Impact Directly Affecting Businesses:

The proposed action will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. This will not have a significant economic effect because the federal Comprehensive Observer Program is congressionally funded and minimizes economic effects on vessels upon which observers ride by funding most observer costs.

(b) Economic Impact on Private Persons: None.

(c) Adversely Impact the Ability of California Businesses to Compete with Businesses in Other States: None.

(d) Impact the Creation or Elimination of Jobs or Businesses or the Expansion of Businesses in California: None.

(e) Fiscal Impact on Public Agencies, Including Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State: None.

(f) Involve Nondiscretionary Costs/Savings to Local Agencies: None.

(g) Mandate Programs on Local Agencies or School Districts: None.

(h) Impose Costs to Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4: None.

(i) Affect Housing Costs: None.

### **IV. Plain English Policy Statement:**

It has been determined that the adoption/amendment of these regulations may affect small businesses. The Commission has drafted the regulations in Plain English pursuant to Government Code sections 11342(e) and 11346.2(a)(1).

## **V. Authority and Reference:**

The Fish and Game Commission proposes this emergency action pursuant to the authority vested by Section 240 of the Fish and Game Code and to implement, interpret, or make specific Section 240 of said Code. Also, the Commission proposes this action based on authority of Fish and Game Code Sections 1006, 7071, 7652, 7923, 8405.3, 8425, 8587.1, 8591 authorizing the Commission to adopt regulations to inspect all boats for fish, and adopt regulations governing nearshore fish stocks, CPFVs, sea cucumbers, squid, and shrimp and prawn fisheries.

Reference sections include Fish and Game Code Sections 7055, 7056, 7058, 7071, 8587, and 8587.1.

## **VI. Section 240 Finding:**

Pursuant to Section 240 of the Fish and Game Code, the Commission made the finding that the adoption of this regulation is necessary for the immediate preservation of the public peace, health and safety, or general welfare.

### **Informative Digest (Plain English Overview)**

Under existing law, State and federal regulations exist to manage groundfish species including rockfish and lingcod. These regulations include State and federal provisions for the placement of fishery observers aboard commercial fishing vessels. Also under existing regulations, lingcod and at least six species of rockfish (bocaccio, cowcod, canary, yelloweye, darkblotched, and widow rockfishes) have been declared overfished off California, and subject to rebuilding requirements as directed under the Magnuson-Stevens Sustainable Fisheries Act. Also under existing law, nearshore rockfish and associated species that are being subjected to increased fishing by commercial and sport fisheries, are directed to be managed on a sustainable basis, that include the setting of annual harvest limits. Annual assessments of the status of shelf and nearshore groundfish stocks depend on the collection of data, including information on bycatch in fisheries that must be collected by fishery observers from vessels while at sea. Some fishing vessels that are fishing for State-managed species or for which a federal permit is not required are refusing to participate in the ongoing federal observer program that collects this vital information. To deal with this problem so that blocks of vital fishery data are not lost, and the integrity of the dependent fisheries assessments are not compromised, emergency regulatory action is proposed to require that commercial fishing vessels permitted by the Commission to operate in State waters that fish for State-managed species off California, and commercial passenger fishing vessels (CPFVs) required to be licensed pursuant to statute, carry federal or State fishery observers during the balance of the 2002 fishing season when fishing for State-managed species permitted or licensed under Commission regulations. These emergency regulations would be followed by a conventional rulemaking to make them permanent and effective during 2003.

## Regulatory Language

Repeal Subsection (e) of Section 195, Title 14, CCR, as follows:

~~(e) Owners and operators of vessels and barges subject to these provisions shall carry and cooperate with department and federal fishery observers, and observers collecting data for the department on trips when space is available, at no charge to the sponsoring agency. If observer coverage of a trip is denied by the owner or operator of a vessel, the department may require an explanation in writing by the owner or operator be submitted to the department within 15 days of the department's request for an explanation.~~

### NOTE

Authority cited: Sections 7071, 7923 and 8587.1, Fish and Game Code. Reference: Sections 7923 and 8587.1, Fish and Game Code.

Adopt Section 105.5, Title 14, CCR, as follows:

### Section 105.5 Cooperation with State and Federal Fishery Observers

(a) Owners or operators of commercial fishing vessels permitted under regulations of the Commission, and commercial passenger fishing vessels licensed pursuant to Fish and Game Code Section 7920, will, as a condition of permit or license issuance, cooperate with Department or Federal fishery observers, or observers collecting data for the Department, when asked to carry and accommodate an observer on fishing trips at no charge to the sponsoring agency.

(b) If observer coverage of a trip is denied by the owner or operator of a vessel, the Department may require an explanation in writing from the owner or operator. This explanation shall be received by the Department within 15 days of written request by the Department for an explanation.

(c) The Department may request revocation of fishing permits or licenses to the Commission for denials that it deems to be uncooperative in nature, after first allowing the owner or operator to meet with the Manager of Marine Region, or his representative, to provide an explanation for the denial.

(d) The Department or Federal agency requesting cooperation under subsection (a) shall not require the vessel operator or owner to provide an observer with meals or a subsistence allowance on observed fishing trips, but shall accommodate the observer with regard to reasonable eating and working conditions and access to pertinent fishing information and fishery data while aboard the vessel.

(e) Failure to provide reasonable eating and working conditions or access to pertinent fishing information or fishery data to observers, or actions taken by a vessel owner or operator against an observer that is prohibited pursuant to subsection (f), on observed

fishing trips may lead to revocation of the vessel's fishing permits or licenses issued under regulations of the Commission following the procedure outlined in subsections (b) and (c) above.

(f) To ensure that observer objectives may be reasonably and safely achieved, consistent with federal groundfish observer rules, it is unlawful for any person to do any of the following:

(1) forcibly assault, resist, oppose, impede, intimidate, sexually harass, bribe, or interfere with an observer,

(2) interfere with or bias the sampling procedure employed by an observer, including physical, mechanical, or other sorting or discarding of any catch before sampling.

(3) tamper with, destroy or discard an observer's collected samples, equipment, or personal gear, without the express consent of the observer,

(4) prohibit or bar by command, impediment, threat, coercion, or refusal of reasonable assistance, an observer collecting samples, making observations, or otherwise performing the observers duties,

(5) harass an observer by conduct that has sexual connotations, has the purpose or effect of interfering with the observer's work performance, or otherwise creates an intimidating, hostile or offensive environment,

(6) require, pressure, coerce, or threaten an observer to perform duties normally performed by crew members.

#### NOTE

Authority cited: Sections 1006, 7071, 7652, 7923, 8405.3, 8587.1, and 8591, Fish and Game Code. Reference: Sections 7055, 7056, 7058, 7071, 7857, 7923, 8587, and 8587.1, Fish and Game Code.